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8 COUNTY OF ALAMEDA, GREGORY J.

AHERN, RAYMOND P. KELLY, and

9 DEREK D. THOMS

10

11

UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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JUVENTINO RODARTE,

) Case No.: CV 14-00468 KAW

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Plaintiff,

)  
)) **COUNTY OF ALAMEDA'S AMENDED**  
16 vs. ) **ANSWER TO COMPLAINT FOR**  
)) **DAMAGES**

17

ALAMEDA COUNTY, GREGORY J.

) **DEMAND FOR JURY TRIAL**

18

AHERN, Alameda County Sheriff, sued in his

) Complaint Filed: January 31, 2014

19

individual capacity, RAYMOND P. KELLY,

Alameda County Deputy Sheriff's Sergeant

sued in his individual capacity, DEREK D.

20 THOMS, Alameda County Deputy Sheriff, sued

in his individual capacity,

21 Defendants.

22

23

COMES NOW defendant COUNTY OF ALAMEDA (hereafter "defendant") and for its answer to the plaintiff's "Complaint for Damages" answers as follows:

24

1. Answering the allegations of paragraphs 1, 2 and 3, these paragraphs contain legal conclusions, rather than factual allegations requiring a response by defendants. The County does not dispute that the allegations currently support jurisdiction and venue in this court.

25

-1-

1       2.     Answering the allegations of paragraphs 4, defendant lacks sufficient information  
2 and belief upon which to admit or deny such allegations and on that basis denies those allegations.

3       3.     Answering the allegations of paragraphs 5 through 8, defendant admits that it is a  
4 public entity, and admits that at the time of the incidents in this case defendants Ahern, Kelly and  
5 Thoms were employed by defendant, but the remainder of the allegations contain legal conclusions  
6 which require no response. To the extent the court disagrees, defendant denies any such legal  
7 conclusions if construed as factual allegations.

8       4.     Answering the allegations of paragraph 9, defendant denies that it knew at the time  
9 of the incident that plaintiff resided in Apartment 17 of 1510 164<sup>th</sup> Avenue in San Leandro.  
10 Defendant does not recall the configuration of the apartment building located at the address above,  
11 but admits that there were at least two floors, and otherwise lacks sufficient information and belief  
12 upon which to admit or deny the remaining allegations and on that basis denies those allegations.

13       5.     Answering the allegations of paragraph 10, defendant admits these allegations and  
14 furthermore alleges that, per the police report, Mr. Furtado also reportedly stated that he had heard  
15 a lot of movement outside of his apartment, that he was fearful of an intruder, and reportedly stated  
16 that someone had tried to break into his residence six months earlier.

17       6.     Answering the allegations of paragraph 11, defendant denies these allegations as  
18 Mr. Furtado reported to police that he heard someone outside.

19       7.     Answering the allegations of paragraph 12, defendant admits these allegations.

20       8.     Answering the allegations of paragraph 13, defendant admits that defendant Thoms  
21 had his service dog, Zina, on a six foot lead when he searched the apartment for the believed  
22 intruder reported by Mr. Furtado. Defendant lacks sufficient information or belief to admit the  
23 remainder of the allegations in this paragraph, and so denies those allegations, inasmuch as two  
24 exterior gates, one of which was near Mr. Furtado's apartment, were noticed to be ajar that  
25 evening (even though, reportedly, they were not supposed to be and/or were closed earlier), and  
26 defendant is unsure which gate plaintiff is alleging police entered the apartment complex through  
27 in search of the believed intruder.

1       9.     Answering the allegations of paragraph 14, defendant admits that officers checked  
 2 the first floor of the apartment building for the believed intruder before moving to the second floor,  
 3 but defendant currently lack sufficient information or belief to admit or deny the remaining  
 4 allegations in this paragraph and on that basis denies these allegations.

5       10.    Answering the allegations of paragraph 15, defendant admits that defendant Thoms  
 6 and Kelly and another officer walked up the stairs to the second floor with service dog Zina on  
 7 leash on the night of the incident, and denies any remaining allegations in this paragraph.

8       11.    Answering the allegations of paragraph 16, defendant admits that a person, later  
 9 identified as defendant, was sitting on the floor in front of apartment 17 with his knees bent into  
 10 his chest, his head bent, and with his hands (and any objects in his hands) and head concealed  
 11 underneath a hood, and denies the remaining allegations of this paragraph.

12      12.    Answering the allegations of paragraph 17, defendant currently lacks sufficient  
 13 information or belief as to the exact distance between the top of the second floor steps and the  
 14 location where plaintiff was seated, and so denies the allegations in this paragraph.

15      13.    Answering the allegations of paragraphs 18 and 19, defendant lacks sufficient  
 16 knowledge or belief as to what plaintiff saw or felt at the time described in this paragraph,  
 17 inasmuch as plaintiff said nothing at the time in response to the officers' verbal statements, and on  
 18 that basis denies the remaining allegations.

19      14.    Answering the allegations of paragraph 20, defendant admits these allegations.

20      15.    Answering the allegations of paragraph 21, defendant denies these allegations in  
 21 that the officers' next move was not to "command[]" service dog Zina to "apprehend" plaintiff.

22      16.    Answering the allegation of paragraphs 22 ad 23, defendant admits that, after  
 23 identifying themselves as police officers, when plaintiff failed to respond to or acknowledge the  
 24 officers' repeated commands to show his hands, which commands continued for over a minute, the  
 25 command was issued to Zina to apprehend plaintiff and Zina bit plaintiff on the left shin below the  
 26 knee.

27      17.    Answering the allegations of paragraph 24, defendant lacks information or belief as

1 to what plaintiff felt at the time described in this paragraph, and so denies those allegations, and  
2 denies that plaintiff lost consciousness inasmuch as he was observed thereafter to begin to  
3 violently thrash about as the officers commanded him to place his hands behind his back.

4       18. Answering the allegations of paragraphs 25 and 26, defendant admits that deputy  
5 Nelson moved in to handcuff plaintiff, and thereafter service dog Zina was commanded to release  
6 her bite, which she immediately did.

7       19. Answering the allegations of paragraph 27, defendant admits that it was only after  
8 plaintiff was handcuffed that officers discovered the metal object hidden in plaintiff's hands that  
9 plaintiff failed to show officers in response to their repeated commands was keys, and not a  
10 weapon.

11       20. Answering the allegations of paragraph 28, defendant denies the allegations of this  
12 paragraph; plaintiff was treated by paramedics at the scene and then additionally taken to the  
13 hospital for care.

14       21. Answering the allegations of paragraph 29, some statements in this paragraph  
15 constitute legal conclusions which require no response, and as to any factual allegations, defendant  
16 denies that no crime had been reported, and that the officers were present for reasons other in  
17 response to a third party's report that a crime might be in the process of being attempted or  
18 committed.

19       22. Answering the allegations of paragraph 30, defendant denies that the use of service  
20 dog Zina was an "attack" but admits the remaining allegations.

21       23. Answering the allegations of paragraph 31, defendant admits these allegations.

22       24. Answering the allegations of paragraph 32, defendant denies on information and  
23 belief the allegations of these paragraphs.

24       25. Answering the allegations of paragraph 33, defendant denies these allegations.

25       26. Answering the allegations of paragraphs 34, 35 and 36, defendant admits that  
26 plaintiff was cited and released in the field for violation of P.C. 148(a)(1), and lacks current  
27 information or belief as to the remaining allegations in these paragraphs.

1       27. Answering the allegations of paragraph 37, defendant admits (without waiving its  
2 right to assert any legal challenges regarding this claim) that a claim form was submitted to the  
3 County of Alameda on August 1, 2013, and that a letter was sent regarding the claim on November  
4 25, 2013, but denies the remaining allegations of this paragraph, and specifically denies any legal  
5 conclusions that may be asserted in this paragraph.

6 28. Answering the allegations of paragraphs 38, 39, and 40, defendant responds that  
7 this paragraph contains legal conclusions which they dispute and which do not require a response,  
8 and further respond that any factual allegations contained therein are denied.

9       29. Answering the allegations of paragraphs 41 through 44, 46, 48, 50, 52 through 58,  
10 60 through 65, 67 through 70, 72 through 77, 80 through 84, 86 through 94, defendants asserts that  
11 each paragraph contains or consists of legal conclusions which are disputed and which do not  
12 require a response. To the extent a court finds any factual allegations in these paragraphs,  
13 defendant either denies them or lacks information or belief as to any factual allegations and so on  
14 that basis denies them.

15       30.     Answering the allegations of paragraphs 45, 47, 49, 51, 59, 66, 71, 78, and 85, these  
16 allegations incorporate by reference the allegations of certain other paragraphs set forth in the  
17 complaint, and so defendants respond by incorporating by reference its answers to those individual  
18 paragraphs referenced therein.   Should the court determine that some other response is required,  
19 defendants on information and belief deny the allegations of these paragraphs.

31. Answering the allegations of paragraphs 79, and 86, defendant admits that service  
dog Zina is a police dog owned and/or utilized by the County, but otherwise denies the remaining  
allegations of these paragraphs.

## SEPARATE AFFIRMATIVE DEFENSES

24 AS A FIRST, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
25 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
26 THEREOF, this answering defendant alleges that the complaint fails to state claims upon which  
27 relief can be granted.

1           AS A SECOND, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 2 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 3 THEREOF, this answering defendant is informed and believes and thereon alleges that plaintiff  
 4 was negligent in and about the activities alleged in the complaint; that said negligence contributed  
 5 and was a proximate cause of plaintiff's alleged injuries and damages, if any, or was the sole cause  
 6 thereof; and that if plaintiff is entitled to recover damages against defendant, then defendant prays  
 7 that the recovery be diminished or extinguished by reason of the negligence of plaintiff in  
 8 proportion to the degree of fault attributable to plaintiff.

9           AS A THIRD, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 10 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 11 THEREOF, this answering defendant alleges that plaintiff's claims are barred by the provisions of  
 12 the Eleventh Amendment to the United States Constitution.

13           AS A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 14 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 15 THEREOF, this answering defendant alleges that the complaint, and each cause of action therein,  
 16 is barred because any detention, search and/or seizure of plaintiff by defendants or any of them  
 17 was supported by probable cause and was otherwise lawful, constitutional privileged and justified.

18           AS A FIFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 19 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 20 THEREOF, this answering defendant alleges that it had legal justification for all actions and  
 21 omissions alleged in said complaint and therefore the complaint and each and every cause of  
 22 action therein is barred.

23           AS A SIXTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 24 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 25 THEREOF, this answering defendant is informed and believes and thereon alleges that the  
 26 complaint and each and every cause of action therein is barred because plaintiff failed to mitigate  
 27 his damages, if any there were.

1 AS A SEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 2 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 3 THEREOF, this answering defendant alleges that any or all of its employees and/or agents is  
 4 immune from any liability and protected against the burden of litigation under the doctrine of  
 5 qualified immunity and the common law and statutory immunities protecting peace officers,  
 6 correctional officers, prosecutors and public officials, including without limitation those set forth  
 7 in California Code of Civil Procedure section 3342, subdivision (b), and California Government  
 8 Code sections 815, 815.2, 815.4, 818, 818.2, 818.7, 818.8, 820, 820.2, 820.21, 820.4, 820.6, 820.8,  
 9 821, 821.6, 822.2, 844.6, 845.2, 845.4, 845.6, 845.8, and 846.

10 AS AN EIGHTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 11 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 12 THEREOF, this answering defendant alleges that it is immune from liability for exemplary  
 13 damages pursuant to provisions of section 818 of the California Government Code and by the  
 14 decision of the United States Supreme Court in *Newport v. Fact Concert, Inc.*, 453 U.S. 247.

15 AS A NINTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 16 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 17 THEREOF, this answering defendant alleges that its agents and/or employees were at all times  
 18 acting without malice, fraud or oppression, and in good faith and therefore are entitled to immunity  
 19 from suit.

20 AS A TENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 21 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 22 THEREOF, this answering defendant alleges that at all times mentioned in the Complaint, each  
 23 defendant performed and discharged in good faith each and every obligation, if any, owed to  
 24 plaintiff.

25 AS AN ELEVENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
 26 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
 27 THEREOF, this answering defendant alleges that at all times material to this action, each

1 defendant had reasonable cause to act and acted properly in valid law enforcement activities.

2 AS A TWELFTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO THE  
3 UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
4 THEREOF, this answering defendant alleges that at all times relevant to plaintiff's complaint  
5 herein, plaintiff knowingly, voluntarily and willingly consented to the search of his property and  
6 person, if, in fact, any such search was performed.

7 AS A THIRTEENTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE TO  
8 THE UNVERIFIED COMPLAINT ON FILE HEREIN, AND TO EACH CAUSE OF ACTION  
9 THEREOF, this answering defendant is informed and believes and thereon alleges that plaintiff  
10 was comparatively at fault in the manner and style as set forth in the case of *Li v. Yellow Cab Co.*  
11 (1975) 13 Cal.3d 804, and each defendant prays that any and all damages sustained by said  
12 plaintiff be reduced by the percentage of his negligence.

13 WHEREFORE, this answering defendant prays as follows:

14 1. That plaintiff takes nothing by of his complaint and that this answering defendant  
15 be dismissed hence;

16 2. For reasonable attorneys' fees;

17 3. For costs of suit incurred herein; and

18 4. For such other and further relief as the Court deems fit and proper.

19 **DEMAND FOR JURY TRIAL**

20 Defendant hereby demands a jury trial in this matter.

22 DATED: August 4, 2014

23 BOORNAZIAN, JENSEN & GARTHE  
A Professional Corporation

25 By: /s/ Lauren O. Pimentel  
26 LAUREN O. PIMENTEL, ESQ.  
27 Attorneys for Defendants  
28 COUNTY OF ALAMEDA,  
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